No. 83-1935 (4)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TONY AND SUSAN ALAMO FOUNDATION, et al.,

Petitioners,

—v.—

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENT

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MOTION OF THE
AMERICAN CIVIL LIBERTIES UNION
FOR LEAVE TO FILE A
BRIEF AMICUS CURIAE
IN SUPPORT OF RESPONDENT

The American Civil Liberties Union respectfully moves for leave to file the attached brief amicus curiae in support of Respondent.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members dedicated to the protection of fundamental civil rights and liberties. The ACLU is committed to the principles of separation of church and state and the free exercise of religion. The ACLU believes the values underlying the Religion Clauses are best served when government maintains a position of neutrality, avoiding both preference for and discrimination against religion, while respecting free exercise concerns.

The point at which an individual or group may seek a religiously based exemption from an otherwise valid obligation of citizenship poses sensitive and difficult issues requiring a resolution of two sets of tensions -- the tension betweeen the requirement of strict neutrality imposed by the Establishment Clause and the desire of a benevolent State to enhance the Free Exercise of religion; and the tension between democratic commitment to majority rule and respect for individual religious conscience. In certain cases, resolving those tensions may prove extremely difficult. This case, however, is not difficult. The claim of religious conscience asserted by an employer to justify an exemption from the payment of minimum wage legislation to employees engaged in secular work does not implicate a genuine issue of religious conscience because it has nothing

to do with worship and does not involve an intrusion into individual religious belief. The Fair Labor Standards Act (FLSA) is secular social legislation, applicable equally to all. The petitioners in this case seek a specialized religious exemption from this general law. Because in our view such an exemption is not warranted on these facts by the Religion clauses, and would itself be violative of the principle of neutrality, the ACLU respectfully submits this brief amicus curiae in support of respondent's position.

Respondent has consented to the filing of this brief amicus curiae. Petitioner has not granted consent.

Dated: December 28, 1984

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INTEREST OF AMICUS

The interest of amicus is set forth in the motion for leave to file attached hereto.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Amicus believes that the District Court and the Court of Appeals properly found the "associates" in this case to be employees within the meaning of the Fair Labor Standards Act, and properly held the petitioners to be subject to the Act. However, in light of the interest of amicus, our argument in this brief will be limited to the questions whether, assuming arguendo, the statutory applicability of the FLSA petitioners are entitled to an exemption from the Act under the Free Exercise and Establishment Clauses of the First Amendment.

2. Application of the federal minimum wage laws to petitioners does not violate the Free Exercise Clause. The application of the minimum wage law does not exert substantial

pressure on adherents to modify their religious beliefs or practices, and is amply justified in any event by the compelling governmental interest in uniform application of the minimum wage laws.

3. Application of the federal minimum wage laws to the petitioners does not violate the Establishment Clause. The Establishment Clause should not shield religiously-affiliated organizations engaged in secular commercial activities from the general labor laws. Since petitioners have chosen to compete in the secular marketplace, their claim to a religiously-based exemption is at its lowest ebb. The recordkeeping requirements of the Act do not excessively entangle government with religion and pose no serious threat to church autonomy. Indeed, to exempt religiously-affiliated organizations engaged in secular or commercial activities from the federal

minimum wage laws would risk unwarranted favoritism of religion.

I. APPLICATION OF THE MINIMUM WAGE PROVISIONS OF THE FAIR LABOR STANDARDS ACT TO RELIGIOUS ORGNAIZATIONS ENGAGED IN SECULAR COMMERCIAL ACTIVITIES DOES NOT VIOLATE THE FREE EXERCISE CLAUSE.

As the Chief Justice noted in United States v. Lee, 455 U.S. 252 (1982), when a religious group elects to engage in secular activities, it may not use the Free Exercise Clause as a mechanism to impose its religious views on the secular society and may not use its religious nature to gain a competitive advantage over secular groups performing the identical functions. Thus, when religious groups have sought exemptions from social welfare legislation designed to advance secular goals, the Court has rejected the request whenever a religious exemption would place unfair burdens on third persons and risk the integrity of a significant government program. E.g., Jacobson v.

Massachusetts, 197 U.S. 11 (1905) (rejecting religious exemption from compulsory vaccination laws); Prince v. Massachusetts, 321 U.S. 158 (1944) (rejecting religious exemption from child welfare laws); United States v. Lee, supra (rejecting religious exemption from social security taxation); Bob Jones University v. United States, 76 L.Ed.2d 157 (1983) (rejecting religious exemption from policies favoring racial equality).

In this case, a religious organization engaged in a variety of secular functions seeks to insulate itself from the minimum wage requirements of the Fair Labor Standards Act because, it claims, its adherents wish to work for less than the minimum wage. The obvious impact of a religious exemption from minimum wage payments on employees and competitors and the serious threat it would pose to the integrity of the minimum wage program would justify -- indeed compel -- a

rejection of petitioner's claim for a religious exemption, even if it were well-founded. However, it does not even qualify as a serious claim for a religious exemption.

In any Free Exercise case, three threshhold questions arise. Is the religious belief or practice sufficiently central to the religion to warrant special constitutional protection?[1] Does the government's action put substantial pressure on the belief or practice?[2] Is the government interest at stake sufficiently important to warrant the possibility that religious belief or practice may be overridden? Only if all three questions are answered affirmatively is it necessary to reach the difficult question of whether a

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[1] Thomas v. Review Board, 450 U.S. 707, 713-16 (1981); United States v. Ballard, 322 U.S. 78 (1944).

[2] Thomas v. Review Board, 450 U.S. at 716-18; Sherbert v. Verner, 374 U.S. 398, 404 (1963).

legitimate government interest can override a sincerely held religious belief. In this case, it is not necessary to reach that question since two of the three threshhold criteria are not satisfied.

First, there is simply no indication, in the Court of Appeals' or District Court's opinions, or in petitioners' brief to this Court, that it is a sincerely held religious tenet of the Alamo Foundation to pay its employees less than a minimum wage. Every desire to advance a person's religion is not the "free exercise" of religion. If it were, then religious organizations could claim exemption from tax laws and a host of other secular laws designed to protect the health, safety and general welfare of employees and the public.[3]

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[3] It is possible, although petitioners have not done so, to construct a more serious religious claim for the foundation's wish not to pay its employees any money, but rather to provide them only with room and board. Conceivably, a church might consider such an
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Second, even if the petitioners have standing to assert the religious beliefs of their employees who have potentially adverse interests,[4] the application of the minimum

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arrangement indispensible to a religious relationship between itself and the willing subjects of its ministry, and to their salvation through the church's work. Even if the church sincerely believed that this relationship would be fatally infected were the employees required to accept compensation for their efforts, however, the FLSA, in conjunction with the Internal Revenue Code, does not require the employees to retain any financial benefit. See infra at 8 & n. 5. The only burden on the church-employer under these circumstances is its acceptance of a tax consequence for engaging individuals to perform secular commercial activity. If this is a "burden" for free exercise purposes at all, it is one that is easily overridden by the compelling purposes of the FLSA. See infra at 10-12.

[4] Petitioners may lack standing to advance the purported constitutional rights of their employees, since their interests may well be adverse. Recently, a federal district court faced a situation virtually identical to this one. The Secretary of Labor brought suit to compel a church-operated school employer to pay its non-professional support employees, such as bus drivers and cafeteria workers, the minimum wage. The employer resisted the Secretary's motion for summary judgment, claiming the religious rights of its employees were at stake. The District Court reasoned:

> Ordinarily, one may not assert the constitutional rights of third parties as a defense. Barrows v. Jackson, 346 U.S. 249, 255 (1953). The fact that third parties' constitutional rights may be implicated

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wage laws does not exert substantial pressure on adherents to modify their beliefs or practices.

If employees want to work for less than the minimum wage, they can donate their wages back to the religious organization (keeping only enough to pay the income tax owed). Such a transaction has no economic consequences so far as the employee is concerned. While the tax consequences of such a donation may be less favorable for the

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> should this court require defendant to pay minimum wage is no justification for a judicial determination of their possible rights at this time.... The interests of defendants' employees and itself are in fact adverse, even though defendant claims that none of its employees have complained about receiving substandard wages and that they are satisfied with the terms of their employment. Realizing that certain employees may be hesitant about coming forward with complaints about their wages because they fear losing their positions, the court cannot in good conscience permit defendant to stand as their representative on this issue.

Donovan v. Shenandoah Baptist Church, 573 F.Supp. 320, 325-26 (W.D. Va. 1983).

religious organization than employing workers for nothing (because the religious organization is effectively out of pocket the sum total of its employees' income tax on amounts beyond the limited charitable deduction), the employees' religious beliefs are only minimally, if at all, affected. The burden -- if it is a burden -- on an Alamo Foundation employee is no different than that placed on any person by the limitation on charitable deductions.[5]

Petitioners also contend that "the religious activity of the associates [i.e., employees] [would be burdened by] the detailed record-keeping requirements of

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[5] I.R.C. § 170(b)(1) provides that contributions to charitable and religious organizations are deductible only up to fifty percent of an individual's adjusted gross income. As a result, a taxpayer who devotes all of his secular income to a religious order is still liable to income tax on a portion of it. Fogarty v. United States, 53 U.S.L.W. 2305 (No. 54-82T, Ct. Cl. 11/19/84) (rejecting argument that income of Jesuit professor at public university is attributable to tax-exempt religious order to which it was donated).

Section 11 of the Fair Labor Standards Act (29 U.S.C. § 211), which would require the associates to maintain and keep records of their activities and to have such available for government inspection." (Pet. Br. 30-31).

The petitioners have misapprehended the statute. Section 11 of the FLSA requires the employer, not employees, to make and preserve the records as to wages and hours necessary to implement the Act. It imposes no burden on employees, let alone a substantial one.

Moreover, the clearly secular nature of the activities at issue assure that required recordkeeping will not impinge on any legitimate interest in religious autonomy.

Third, the government's interest in protecting the health and well-being of workers through the minimum wage laws is obviously sufficient.[6] Indeed, even if one assumes the existence of a genuine burden on

religious conscience, the religious exemption should be rejected because the effect on third persons (employees and competitors) would be severe, and because religious exemptions would threaten the integrity of the minimum wage structure.[7] Jacobson v.

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[6] See, e.g., S.Rep. No. 1487, 89th Cong., 2nd Sess., reprinted in U.S. Code Cong. & Ad. News 3002, 3003 (1966).

[7] Faced with a claimed religious exemption from the federal minimum wage laws in Donovan v. Shenandoah Baptist Church, the District Court closely tracked this Court's analysis in United States v. Lee:

> While accommodation should be sought whenever possible, there is a point at which accommodation would 'radically restrict the operating latitude of the legislature.' Braunfeld v. Brown, 366 U.S. 599, 606 (1961). Were every organization either affiliated with or operated by a religious association granted an exemption from the Act's minimum wage provisions, an unduly large segment of the American work force would be left without the benefit and protection of the Act. Courts would be called upon to adjudicate the free exercise claims of a multitude of organizations, each in their own way asserting religious tenets that would somehow be violated by enforcement of the Act. The minimum wage requirements imposed on employees must, therefore, be applied uniformly to all, except as Congress in its wisdom and discretion provides otherwise.

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Massachusetts, supra, Prince v. Massachusetts, supra, and United States v. Lee, supra, make clear that social welfare legislation cannot be avoided through resort to the Free Exercise Clause where third parties would suffer or the goverment program would be endangered.[8]

II. APPLICATION OF THE FAIR LABOR STANDARDS ACT TO RELIGIOUS ORGANIZATIONS ENGAGED IN SECULAR COMMERCIAL ACTIVITIES DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

A religious claimant, whether individual or institutional, may of course argue that the Establishment Clause prevents application of a statute because the statute will result

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573 F.Supp. at 327. Compare United States v. Lee, 455 U.S. at 259-60.

[8] There may, of course, be settings in which the application of social welfare legislation to religious -- as opposed to secular -- activity would pose a serious threat to Free Exercise values such as church autonomy. Given the lack of such a threat under the facts of this case, this is an inappropriate vehicle to consider whether, for example, minimum wage legislation could be applied to clergy performing religious functions.

in impermissible entanglement between church and state and therefore threaten religious autonomy. The petitioners in this case, however, operate a wide variety of businesses, including a service station, a restaurant, a freight carrier, a hog farm, and a telegraph company. The businesses "owned or operated by the Foundation are ordinary commercial businesses which offer goods and services to the general public in competition with for-profit businesses," the District Court was careful to note. 567 F.Supp. 556, 561.

The federal appellate courts have consistently held that the Establishment Clause does not shield religiously-affiliated organizations engaged in predominantly secular activities from social welfare laws.[9] These decisions, focusing on the

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[9] These cases include St. Elizabeth Hopsital v. NLRB, 715 F.2d 1193, 1196-97 (7th Cir. 1983) (hospital open to general public), St. Elizabeth Community Hospital
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predominantly secular nature of the activities of religiously-affiliated institutions such as hospitals and hotels, embody a common-sense tacit recognition that there is a significant qualitative difference between rights of religious autonomy asserted by an individual or church engaged in core religious activity, and those same rights asserted by a religiously-affiliated organization engaged in secular activity or commerce. These cases accord entirely with this Court's statement of general principle in United States v. Lee: "When followers of a particular sect enter into commercial activity as a matter of choice, the limits

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v. NLRB, 708 F.2d 1436, 1442 (9th Cir. 1983) (hospital open to general public), Tressler Lutheran Home v. NLRB, 677 F.2d 302, 305-07 (3d Cir. 1982) (nursing home open to general public), NLRB v. St. Louis Christian Home, 663 F.2d 60, 63-65 (8th Cir. 1981) (government-funded home for battered children), and NLRB v. World Evangelism, Inc., 656 F.2d 1349, 1353-54 (9th Cir. 1981) (office complex, hotels and restaurant open to public).

they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." 455 U.S. at 261.

Since the Alamo Foundation has elected to function in the secular marketplace, its claim to religious autonomy premised on the Establishment Clause is at its lowest ebb.

Measured by the three tests of Lemon v. Kurtzman, 403 U.S. 602 (1971), the Alamo Foundation's claim to an Establishment Clause exemption from the federal minimum wage laws should fail.

Plainly the Fair Labor Standards Act has a secular purpose, and just as plainly the primary effect of the FLSA is neither to advance nor inhibit religion.

Nor does the FLSA create excessive government entanglement with religion. The petitioners contend otherwise, relying on the

record-keeping requirements of § 211. (Pet. Br. 39.) The answer to this charge is provided by the well-reasoned opinion of the District Court in Donovan v. Shenandoah Baptist Church:

> That the Government requires covered employers to maintain adequate payroll records, and that it may require an employer to periodically make available such records for examination and inspection, does not mean that defendant's religious affairs will be subject to ongoing surveillance or that the Government will become enmeshed in its religious affairs. Indeed, as the FLSA's minimum wage provisions are concerned solely with how much non-exempt employees are paid, there would be no occasion for governmental involvement in defendant's doctrinal or other religious concerns. Investigations, properly conducted in accordance with 29 U.S.C. § 211, require no significant disruptions of defendant's religious or educational activities.

573 F.Supp. at 325. See Committee for Public Education v. Regan, 444 U.S. 646, 660-61 (1980).

The problem of entanglement in this case

is of a very different order than that posed by NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979). There, the Court held that, given the serious question of excessive entanglement raised by the assertion of Labor Board jurisdiction over parochial schools and the extension of collective bargaining under the continuing supervision of the NLRB to teachers in those schools, it was necessary to identify an "affirmative intention of the Congress, clearly expressed," before finding that jurisdiction was statutorily warranted. 440 U.S. at 501. But that case was marked by this Court's recognition of "the critical and unique role of the teacher in fulfilling the mission of a church-operated school," as well as the greater and ongoing role of the Board in defining the content of the ongoing teacher/school relationship. 440 U.S. at 501, 502-03. Manifestly, no such sensitive considerations

are present in this case, and the Court should not utilize the same approach regarding legislative intent.

Indeed, to exempt religiously-affiliated employers engaged in commercial or other secular activities from the federal minimum wage laws would be an unwarranted discrimination in favor of religion. Of primary importance to the Court in Walz v. Tax Commission, 397 U.S. 664 (1970), upholding the constitutionality of a property tax exemption for churches, was the fact that the state "had not singled out ... churches as such," but rather had granted exemption to a broad range of nonprofit organizations. More recently, in Mueller v. Allen, 463 U.S. 721 (1983), the Court found dispositive that a tax deduction alleged to have the unconstitutional effect of advancing religion was available to parents of children in all schools, not just parochial schools. 463

U.S. at 73[illegible], distinguishing Committee for Public Education v. Nyquist, 413 U.S. 756 (1973). The lower courts have implemented this teaching. See, e.g., Forest Hills Early Learning Center, Inc., v. Lukhard, 728 F.2d 230 (4th Cir. 1984), holding a state's exemption of religiously-affiliated child care centers from its health and safety laws violative of the Establshment Clause.

CONCLUSION

For the foregoing reasons, the judgment,

as modified by the Court of Appeals, should be affirmed.

Respectfully submitted,

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